No. SC92846

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

MARD WOODEN,

Appellant.

Appeal from the Associate Circuit Court of the City of St. Louis
Twenty-Second Judicial Circuit, Division 24
The Honorable Paula Bryant, Judge

RESPONDENT'S BRIEF

JEROME MCDONALD
Missouri Bar No. 63412
Office of the Circuit Attorney
1114 Market Street, Room 401
St. Louis, Missouri 63101
314.622.4941/314.622-4838
mcdonaldj@stlouiscao.org

ATTORNEY FOR RESPONDENT

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JURISDICTIONAL STATEMENT

Respondent adopts Appellant's Jurisdictional Statement.

STATEMENT OF FACTS

Appellant was charged by the State of Missouri with: (1) the class A misdemeanor of harassment, Section 565.090.1(2) RSMo, in that Appellant, while communicating with Kacie Starr-Triplett between February 19, 2011, and February 21, 2011, knowingly used coarse language offensive to one of average sensibility, and as a result put Ms. Triplett in reasonable apprehension of offensive physical contact or harm; (2) the class A misdemeanor of harassment, Section 565.090.1(5) RSMo, in that Appellant, between February 21, 2011, and February 24, 2011, knowingly made repeated unwanted communication with Ms. Triplett by sending emails to her; and (3) the class A misdemeanor of possession of marijuana. L.F. 122-24.[1] The defendant was found guilty of all three counts by a jury. L.F. 137-39.

[1] The record on appeal will be cited to as follows: Trial Transcript (Tr.), Legal File (L.F.). In addition, the original Information charged Appellant with only the class A misdemeanor of harassment under section 565.090.1(5) for making repeated unwanted communication (Count I), and with possession of marijuana (Count II). L.F. 7-8. Subsequently, an Amended Information was filed adding a second count of harassment under Section 565.090.1(2) for using coarse language. Respondent is unable to

Kacie Starr-Triplett began serving as the alderwoman for the Sixth Ward of the City of St. Louis in 2007, and she was holding that position in February 2011 when she began receiving the emails at issue from Appellant. She received these emails at an email address that was published on her website and visible to the public, and the emails were also sent to several other individuals. Tr. 222, 254-58, 269. On February 19, 2011, Ms. Triplett received an email from Appellant which contained an attached audio file. Tr. 236-38; Respondent's. Ex. 10. One of the recordings on the audio file was a nearly nineteen-minute-long recording, entitled "Fo's Fo Dem Ho's[2]," in which Appellant referenced himself as the "Wheelchair Profit" and talked about how he had sawed off the barrel of a shotgun. Respondent's Ex. 10, mins. 0:00-0:03, 2:42-2:52. In the audio attachment Appellant specifically mentioned Ms. Triplett, and spoke about how she paid too much attention to rich people and did not visit a certain neighborhood in the city. Immediately after talking about Ms. Triplett, Appellant spoke about the biblical figure

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provide the Amended Information because it is not contained in the court file. However, Appellant agrees that he was charged with the two counts of harassment, which is how the jury was instructed. Appellant's Brief at 8; L.F. 122-24.

[2] This recording will be referred to as "the audio attachment."

Jezebel, and referred to Jezebel as a "bitch" who would be eaten. Respondent's Ex. 10, mins. 6:40-9:00. Appellant further stated that he was going to "load up with this shotgun blast" and that "this boy making a mess of everything with his sawed-off," and he mentioned "getting politicians" and "making a mess of everything." Respondent's Ex. 10, mins. 9:30-10:00. He also referenced a "sawed-off" a second time immediately before he stated that Jezebel abused weak people the same way the "bitch" Ms. Triplett did, and that Ms. Triplett was a "bitch in the Sixth Ward." Respondent's Ex. 10, mins. 10:18-11:00. In addition, Appellant referenced domestic terrorism and several instances of violent shootings, including the assassination of President John F. Kennedy, Jr., the shooting of a Congresswoman, and the murder of a federal judge. Respondent's Ex. 10, mins. 12:27, 13:03-14:35. Near the end of the recording Appellant again referenced the "bitch" Jezebel and the "bitch" Ms. Triplett, and stated that Jezebel would be eaten by dogs. Respondent's Ex. 10, mins. 16:06-17:10. Finally, Appellant said that Ms. Triplett was killing her own for power. Respondent's Ex. 10, mins. 17:28-17:34.

Ms. Triplett testified at trial that after listening to the audio attachment she felt concerned and threatened because Appellant had referenced a Congresswoman who had been shot, referred to himself as a domestic

terrorist, called her a bitch, and mentioned having a sawed-off shotgun. Further, Ms. Triplett explained that she "didn't know what [Appellant] would do," and "didn't know if [Appellant] was going to be violent or have a gun or anything." Tr. 238-39, 274. Ms. Triplett also testified that she felt concerned that the references to Jezebel were being directed towards her. Tr. 305.

After receiving four emails from Appellant between February 19, 2011, and February 21, 2011, Ms. Triplett sent Appellant an email asking him to stop emailing her. Tr. 244-45. After acknowledging her request, Appellant sent three additional emails to Ms. Triplett from February 21, 2011, through February 24, 2011. Tr. 246-51. Ms. Triplett testified that after receiving the emails from Appellant, she contacted the police because the emails were threatening, aggressive, and intimidating. Tr. 225, 262. Further, Ms. Triplett filed for a restraining order against Appellant, testifying at the trial that she feared for her safety due to the threatening nature of the emails, and the fact that Appellant referenced a sawed-off shotgun. Tr. 226-27.

Ms. Triplett also testified that she had known Appellant since 2007, and that she never had a problem with him calling her, stopping by her office, or sending her emails until the tone of the emails changed and she

told him to stop contacting her. Tr. at 223-24, 263-64. Finally, Ms. Triplett testified that she did not believe the emails from Appellant were about government, and that they were "about feeling threatened and intimidated, and feeling less than a person." Tr. 266.

A jury found Appellant guilty of all three counts. L.F. 137-39. Appellant was sentenced to one day in the St. Louis Medium Security Institution on each count, to be served concurrently. L.F. 143. He now appeals. L.F. 144-47.

POINTS RELIED ON

I – This Court has held that section 565.090.1(5) is unconstitutionally overbroad, thus Appellant's conviction under Count II resulted in a manifest injustice and should be reversed.

Section 565.090.1(5), RSMo.

State v. Burgin, 203 S.W.3d 549 (Mo. App. E.D. 2006)

State v. Vaughn, 366 S.W.3d 513 (Mo. 2012)

II – The trial court did not err in denying Appellant's motion to dismiss Count I because section 565.090.1(2) does not violate Appellant's rights to freedom of speech and due process of law as guaranteed to him by the First and Fourteenth Amendments to the United State's Constitution and Article 1, §§ 8 and 10 of the Missouri Constitution, because it ensures the legitimate right of citizens to be free from coarse and offensive language placing them in apprehension of offensive physical contact or harm.

Section 565.090.1(2), RSMo.

Cantwell v. State of Connecticut, 310 U.S. 296 (1940)

Chaplinsky v. United States, 315 U.S. 568 (1942)

State v. Koetting, 691 S.W.2d 328 (Mo. App. E.D. 1985)

U.S. Const. Amend. I, XIV

Mo. Const. art. I, §§ 8 and 10

III - The trial court did not err in denying Appellant's motion for judgment of acquittal on Count I at the close of all evidence, or in entering judgment on the jury's verdict of the crime of harassment under section 565.090.1(2), because the State presented sufficient evidence, or evidence from which reasonable inferences could be drawn, that Appellant, when communicating with Ms. Triplett, knowingly used coarse language offensive to one of average sensibility, and thereby put Ms. Triplett in reasonable apprehension of offensive physical contact or harm.

Section 565.090.1(2), RSMo.

State v. Koetting, 691 S.W.2d 328 (Mo. App. E.D. 1985)

U.S. Const. Amend. I, XIV

Mo. Const. art. I, §§ 8 and 10

ARGUMENT

I – This Court has held that section 565.090.1(5) is unconstitutionally overbroad, thus Appellant's conviction under Count II resulted in a manifest injustice and should be reversed.

Preservation. To properly raise a constitutional issue, a party must: (1) raise the question at the first available opportunity; (2) specifically designate the constitutional provision alleged to have been violated, such as by explicit reference to the article and section, or by quotation from the particular provision; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout the proceeding for appellate review. *State v. Blair*, 175 S.W.3d 197, 199 (Mo. App. E.D. 2005); Rule 24.04(b)(2). "Additionally, a constitutional challenge to a statute must not only have been presented to the trial court, but the trial court must have ruled thereon." *Mo. Prosecuting Attorneys Ret. Sys. v. Pemiscot County*, 217 S.W.3d 393, 400 (Mo. App. S.D. 2007); *Strong v. State*, 263 S.W.3d 636, 646 (Mo. banc 2008) ("an attack on the constitutionality of a statute is a matter of such dignity and importance that the issues should be fully developed at trial and not as an afterthought on appeal").

The State agrees with Appellant that this Court should review for plain error Appellant's constitutional claim related to Count II, as defense

counsel challenged the constitutionality of Count II on different grounds. L.F. 10-11, 22-23.

Standard of Review. Issues that were not raised below are reviewed by this Court for plain error only. *State v. Strong*, 142 S.W.3d 702, 710 (Mo. banc 2004). Plain error requires a finding that manifest injustice or a miscarriage of justice resulted from the trial court's error. *Id.* A statute that is found to be unconstitutional is void, and a conviction under an unconstitutional law is illegal and void. *State v. Burgin*, 203 S.W.3d 549, 713 (Mo. App. E.D. 2006).

In *Burgin*, John Burgin was convicted by a jury under a statute that this Court invalidated while Burgin's appeal was pending. *Id.* at 714-15. The Court reversed Burgin's conviction, holding that a manifest injustice had occurred because Burgin was convicted under a statute that was later invalidated. *Id.* at 718.

In *State v. Vaughn*, 366 S.W.3d 513 (Mo. 2012) this Court held that section 565.090.1(5) is unconstitutionally broad, and the Court severed that definition of harassment from the other five definitions of harassment contained in the statute. *Vaughn*, 366 S.W.3d at 520-21.

Accordingly, Appellant's conviction under Count II should be reversed.

II – The trial court did not err in denying Appellant's motion to dismiss Count I because section 565.090.1(2) does not violate Appellant's rights to freedom of speech and due process of law as guaranteed to him by the First and Fourteenth Amendments to the United State's Constitution and Article 1, §§ 8 and 10 of the Missouri Constitution, because it ensures the legitimate right of citizens to be free from coarse and offensive language placing them in apprehension of offensive physical contact or harm.

Preservation. Defense counsel filed written motions to dismiss Counts I and II. LF 10-11, 22-23.

Standard of Review. A trial court's ruling on a motion to dismiss is reviewed for an abuse of discretion. *State v. Keightley*, 147 S.W.3d 179, 184 (Mo. App. W.D. 2004). A trial court abuses its discretion when a ruling is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id.*

Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision. *State v. Pribble*, 285 S.W.3d 310, 313 (Mo. banc 2009). The party challenging the validity of a statute has the burden of proving that the act

clearly and undoubtedly violates constitutional limitations. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008). Any doubt about the constitutionality of a statute will be resolved in favor of the statute's validity. *State v. Stokely*, 842 S.W.2d 77, 79 (Mo. banc 1992).

Discussion. "[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). The right of free speech, however, is not absolute. *Chaplinsky v. United States*, 315 U.S. 568, 571 (1942). There are several classes of speech which do not receive constitutional protection, including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words-those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* at 572. The United States Supreme Court has held that "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Cantwell v. State of Connecticut*, 310 U.S. 296, 309-10 (1940). Further, the Court in *Cantwell* explained that "resort to epithets or personal abuse is not in any proper sense

communication of information or opinion safeguarded by the Constitution." *Id*. In addition, the Court of Appeals has held that to determine a word's criminal offensiveness, a court must examine the circumstances in which the word was spoken, and that factors relevant to the analysis include the speaker's intention, the source, and the location and direction of the remark. *State v. Koetting*, 691 S.W.2d 328, 330 (Mo. App. E.D. 1985).

Appellant claims that he was entitled to a dismissal of Count I because his communications with Ms. Triplett were meant as a commentary on her performance as an elected official, and thus that section 565.090.1(2) is unconstitutional as applied to him in this case.

Section 565.090.1(2) in not unconstitutional as applied in this case. While Appellant stated in the audio attachment that Ms. Triplett paid too much attention to rich people and did not visit a certain neighborhood, the vast majority of that recording had nothing to do with expressing political ideas. Instead, Appellant referred in the audio attachment to sawing off a shotgun; to "making a mess of everything with his sawed-off" and "getting" politicians; to domestic terrorism; and to the shooting of a Congresswoman and the murders of President Kennedy and a federal judge. Appellant also made personal attacks against Ms. Triplett, as he called her a bitch multiple

times, compared her to the biblical figure Jezebel, and referenced Jezebel's death.

Appellant's language in the audio recording was lewd and obscene, and thus is undeserving of constitutional protection. The court in *Keotting* found that Donald Keotting used coarse language offensive to one of average sensibility when in two separate phone conversations he referred to the complaining witness as a "son of a bitch." *Keotting*, 691 S.W. 2d at 330-31. Although the court decided that the offensive character of Keotting's words was increased because the complaining witness was not a public official and was in his home when he received the phone call, the court also relied on the fact that the words were directed at the complaining witness, were not made in jest, and were made with the intent to disturb. *Id*. at 330-31. Here, Ms. Triplett was a public official. However, the audio attachment was directed at her, as Appellant sent it to her email address and mentioned her name several times. Further, the angry tone and references to guns, violence, and death show that Appellant's statements were not made in jest, but were an attempt to disturb Ms. Triplett. Finally, Appellant's references to guns, violence, and death had nothing to do with conveying a political message or idea, and the United States Supreme Court has made it clear that

resorting to personal abuse is not communication that is safeguarded by the Constitution. *Cantwell*, 310 U.S. at 309-10.

In addition to being lewd and obscene, the language used by Appellant, along with the angry tone used to convey those words, amounted to fighting words. In *Chaplinsky*, the Supreme Court held that the words "damn racketeer" and "damn Fascist" were fighting words that were unworthy of constitutional protection, as they were likely to provoke the average person to retaliation. *Chaplinsky*, 315 U.S. at 574. While, unlike in the present case, Walter Chaplinsky spoke those words in a face-to-face situation, *id*. at 569-70, Appellant specifically mentioned Ms. Triplett in the audio attachment. Further, Appellant's multiple references to shotguns and the deaths of political figures are of a more severe and violent nature than the two phrases uttered by Chaplinsky. In fact, Ms. Triplett felt so threatened by Appellant's words that she contacted the police and sought an order of protection against him. It is easy to imagine how Appellant's words could have provoked a person with a temperament different than Ms. Triplett's to retaliate.

Because section 565.090.1(2) does not violate Appellant's rights to freedom of speech and due process of law as guaranteed to him by the First and Fourteenth Amendments to the United State's Constitution and Article

1, §§ 8 and 10 of the Missouri Constitution, the trial court did not err in denying Appellant's motion to dismiss Count I. Respondent respectfully requests that this Court uphold Appellant's conviction under Count I.

III - The trial court did not err in denying Appellant's motion for judgment of acquittal on Count I at the close of all evidence, or in entering judgment on the jury's verdict of the crime of harassment under section 565.090.1(2), because the State presented sufficient evidence, or evidence from which reasonable inferences could be drawn, that Appellant, when communicating with Ms. Triplett, knowingly used coarse language offensive to one of average sensibility, and thereby put Ms. Triplett in reasonable apprehension of offensive physical contact or harm.

Standard of Review. In a challenge to a trial court's determination of guilt based on the sufficiency of evidence, the appellate court "must view the evidence and all reasonable inferences derived therefrom in a light most favorable to the verdict and disregard any contrary evidence and inferences." *State v. Whittemore,* 276 S.W.3d 404, 276 (Mo. App. S.D. 2009). In determining whether the evidence was sufficient to support a conviction, this Court asks only whether there was sufficient evidence from which the trier of fact could reasonably have found the defendant guilty. *State v. Latall*, 271 S.W.3d 561, 566 (Mo. banc 2008). This Court accepts all evidence, direct and circumstantial, and all reasonable inferences supportive of the judgment, disregarding the contrary evidence. *State v. Reed*, 181 S.W.3d

567, 569 (Mo. banc 2006). This Court defers to the trial court to "assess the credibility of witnesses and the weight and value of their testimony." *State v. Hoosier,* 267 S.W.3d 767, 770 (Mo. App. S.D. 2008).

Discussion. A person violates section 565.090.1(2) and commits the crime of harassment if that person "[w]hen communicating with another person, knowingly uses coarse language offensive to one of average sensibility and thereby puts such person in reasonable apprehension of offensive physical contact or harm." RSMo § 565.090.1(2). In Count I, Appellant was charged under subsection (2) because while communicating with Ms. Triplett between February 19, 2011, and February 21, 2011, he knowingly used coarse language offensive to one of average sensibility, and as a result put Ms. Triplett in reasonable apprehension of offensive physical contact or harm. L.F. 122.

On appeal, Appellant claims that the State failed to present sufficient evidence that he used coarse language offensive to one of average sensibility, or that any fear felt by Ms. Triplett as a result of the communication was reasonable.

First, the evidence presented to the jury supports a finding that Appellant used coarse language offensive to one of average sensibility. In the audio attachment, Appellant referred to sawing off a shotgun; to "making

a mess of everything with his sawed-off" and "getting" politicians; to domestic terrorism; and to the shooting of a Congresswoman and the murders of President Kennedy and a federal judge. He also made personal attacks against Ms. Triplett, as he called her a bitch multiple times, compared her to the biblical figure Jezebel, and referenced Jezebel's death. Further, Appellant made these statements in a loud and angry tone.

As explained in the previous section, Appellant's statements in the audio attachment qualify as coarse language under *Koetting*, because, despite Appellant's argument to the contrary, the audio attachment was directed toward Ms. Triplett, as Appellant sent it to her email address and mentioned her name in the attachment multiple times. Further, the angry tone and continuous references to guns, violence, and death show that Appellant's statements were not made in jest, but were an attempt to disturb Ms. Triplett, especially given the fact that Ms. Triplett held public office, and Appellant made several references to violence against public officials.

Second, the evidence presented to the jury supports a finding that as a result of Appellant's coarse language, Ms. Triplett was placed in apprehension of offensive physical contact or harm. Ms. Triplett testified that after listening to the audio attachment she felt concerned and threatened because Appellant referenced a Congresswoman who had been shot, referred

to himself as a domestic terrorist, called her a bitch, and mentioned having a sawed-off shotgun. She further testified that she was particularly concerned because she did not know if Appellant was going to have a gun or act violently towards her. Further, Ms. Triplett testified that she felt the references to Jezebel were being directed to her; that she felt concerned that Appellant stated that Jezebel was wicked and would get her due; and that she did not believe Appellant's emails were about government. Finally, the fact that Ms. Triplett contacted the police and sought and order of protection against Appellant shows that she was in apprehension of offensive physical contact or harm.

Third, Ms. Triplett's apprehension of offensive physical contact or harm was reasonable, as she had received a loud and angry nineteen-minute-long audio recording from Appellant, in which her name was repeatedly mentioned, and in which Appellant made multiple references to guns, violence, and the deaths of politicians.

Appellant argues on appeal that the State did not produce sufficient evidence that it was Appellant's intent to cause her fear, and that he did not intend to harm Ms. Triplett. Appellant's intent, however, is irrelevant. Other than proving that a defendant knowingly used coarse language offensive to one of average sensibility, section 565.090.1(2) does not require

the State to prove a defendant's intent. Instead, the State is required to prove only whether the recipient of the communication was placed in reasonable apprehension of offensive physical contact or harm.

Because the evidence supports a finding that Appellant, when communicating with Ms. Triplett, knowingly uses coarse language offensive to one of average sensibility, and thereby put Ms. Triplett in reasonable apprehension of offensive physical contact or harm, the conviction does not violate Appellant's rights to due process of law and a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 8 and 10 of the Missouri Constitution. Respondent respectfully requests that this Court uphold Appellant's conviction under Count I.

CONCLUSION

For the reasons stated in Point I of this brief, Respondent suggests that Appellant's conviction under Count II should be reversed. For the reasons stated in Points II and III of this brief, Respondent requests that this Court uphold Appellant's conviction under Count I for the class A misdemeanor of harassment under section 565.090.1(2).

Respectfully submitted,

/s/ Jerome McDonald
Jerome McDonald
Missouri Bar No. 63412
Office of the Circuit Attorney
1114 Market Street
Room 401
St. Louis, Missouri 63101
314.622.4941/314.622.4838
mcdonaldj@stlouiscao.org

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(h) and Special Rule 363, I hereby certify that on this 12th day of October, 2012, an electronic copy of this brief was sent through the Missouri Supreme Court e-filing system, and notice was provided to Amanda Faerber, attorney for Appellant. I further certify that this brief was prepared with Microsoft Word for Windows, Times New Roman 14 point font, and that the word processing software identified that the brief contains 3,704 words, excluding the cover, certification, Table of Contents, and Table of Authorities.

/s/ Jerome McDonald
Jerome McDonald
Missouri Bar No. 63412
Office of the Circuit Attorney
1114 Market Street, Room 401
St. Louis, Missouri 63101
314.622.4941/314.622-4838
mcdonaldj@stlouiscao.org